No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,
Appellants,

vs.

GRACE APPLETON McKEY,
Appellee.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I.

ISSUES INVOLVED.

The issues involved in this case are considerably curtailed by appellee's waiver of all attacks on the default judgment of the District Court (Appellee's Brief p. 52) except her attack based on the alleged insufficiency of Herrington's affidavit for the order of publication of summons. Furthermore, our argument that her motion was made after the time provided by the Rules of Civil Procedure (55(c) and 60(b)) and was not a motion to vacate the judgment was answered by appellee as follows (p. 3 of her brief):

> "An adequate answer to appellant's argument is that the judgment being a void one, the court

had power to set it aside on its own motion without any intervention by appellee."

Appellee in this connection refers to the authorities cited on pages 22 to 24 of her brief, all of which antedate the Rules of Civil Procedure and are to the effect that a judgment void on its face can be vacated after the term of Court.

One further issue to be discussed here is whether or not appellee consented to the jurisdiction of the Court over her person by raising in her motion the point of the statute of limitations which has to do with the merits rather than an attack on the sufficiency of the judgment and by raising the question of the jurisdiction of the Court over the subject matter in litigation.

Whether the judgment is or is not a nullity is the sole issue of law before this Court.

II.

CAN A MOTION CORRESPONDING TO THE FORMER WRITS OF CORAM VOBIS AND CORAM NOBIS BE MADE AT ANY TIME AFTER THE CLOSE OF THE SIX MONTHS' PERIOD FIXED BY RULES 55(c) AND 60(b) OF THE RULES OF CIVIL PROCEDURE?

In our opening brief we were concerned with the question whether appellee after expiration of the six months' period prescribed by Rules 55(c) and 60(b) of the Rules of Civil Procedure, could collaterally attack the judgment on the grounds indicated in her motion. We therefore refrained from discussing

whether a motion in the nature of the former writs of *coram vobis* and *coram nobis* could be made more than six months after entry of judgment. (Our Opening Brief p. 16.) Appellee now by claiming that the judgment is a nullity necessarily refers to her own motion as a motion in the nature of the former writs of *coram vobis* and *coram nobis* which were availed of in the case of judgments which were entirely void.

The Rules of Civil Procedure expressly reserve, in Rule 60(b), the right of a defendant to bring an independent action in equity after the expiration of the six months' period provided in the above rule. There is no provision granting the right to urge the nullity of a judgment by motion after the six months' period. It is therefore an open question whether under the Rules of Civil Procedure a defendant can claim nullity of the judgment by making a motion after expiration of the six months' period therein prescribed.

However, this question differs in nature from the one which we discussed in our opening brief with respect to defective judgments which are not entirely void. A federal judgment which is based on a defective affidavit for publication is not a nullity under federal precedents. Appellee has not been able to cite any federal authority declaring such judgment a nullity, and a motion in the nature of the former writs of *coram vobis* and *coram nobis* is not applicable to this judgment. It would therefore be academic to discuss in this case the question whether a federal judgment which is a nullity can or cannot be attacked by motion beyond the time limit prescribed in Rules 55(c) and 60(b).

III.

THE QUESTION WHETHER A FEDERAL JUDGMENT IS A NULLITY IS GOVERNED BY FEDERAL LAW AND PRECEDENTS.

It is elementary that service of process is governed by local law except where the Rules of Civil Procedure or other federal law prescribes the mode of service. On the other hand, the question of whether a judgment is a nullity because of defects connected with the service of process, or any other reasons is, in the case of a federal judgment, governed by federal law.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797;

United States v. Mayer, 235 U. S. 55, 69, 59 L. ed. 129, 136;

Note 182 in 28 *U. S. C. A.,* Sec. 724 (referred to on p. 14 of our opening brief).

We are by no means concerned with the facts in the cases of *Bronson v. Schulten,* supra, and *United States v. Mayer,* supra. We are interested only in the principle enunciated by the United States Supreme Court in those cases which is clearly to the effect that the question whether there exists in a federal Court "the authority to set aside, *vacate* and modify its final judgments after the term at which they were rendered * * * can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts." (Italics ours.) This language of the opinion in the leading case of *Bronson v. Schulten,* supra, was adopted verbatim in *United States v. Mayer,* supra.

It clearly states that a judgment of a federal Court can be vacated only according to federal law and precedent.

We will now discuss the federal authorities which are to the effect that defects in an affidavit for the publication of summons concerning the mode of proof, do not suffice to make a judgment *coram non judice.*

In our opening brief (pp. 20-24) we referred to *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565, and *Thompson v. Thompson,* 226 U. S. 551, 57 L. ed. 347, in both of which cases it was held that defects in an affidavit for an order of publication of summons under the rules of the state law concerning the requirements of proof for publication of service, do not make a judgment rendered upon such service *coram non judice* and subject to collateral attack.

We by no means are admitting that Herrington's affidavit was defective according to California law and we will discuss this point separately hereafter (pages 31 to 45 of this brief). However, assuming for the purposes of this argument that Herrington's affidavit did not comply with the requirement of California law, this fact would not under federal authorities lead to the conclusion that the judgment of the District Court made upon such service was a nullity and *coram non judice.*

Appellee, discussing the applicability of the case of *Pennoyer v. Neff,* supra (pages 30-31 of her brief), tries to distinguish the *Pennoyer* case on two grounds: First, that there is nothing in the opinion in *Pennoyer*

v. Neff which indicates the character of the defects in the affidavit, and that there is certainly nothing in the decision to indicate that the affidavit was attacked because it contained no competent evidence and was mere hearsay; second, that the case arose under the laws of Oregon and that the Supreme Court was interpreting Oregon law in the light of decisions of Oregon Courts.

We answer this comment as follows: First, in our opening brief (pages 2-22), we have quoted verbatim the affidavit for publication in the case of *Pennoyer v. Neff,* supra, which merely stated "that defendant Marcus Neff is a non-resident of this state, that he resides somewhere in California, at what place affiant knows not, and he cannot be found within this state". We referred for this quotation to the report of the trial Court's decision in *Neff v. Pennoyer,* 17 Fed. Cases, 1279, and we refer again to the detailed statement of facts in that lengthy decision upon which appellee passes silently. The above affidavit which can hardly be surpassed in brevity, was attacked as incompetent evidence to obtain an order granting publication of service because it stated only an ultimate fact, to-wit, that defendant was a non-resident of Oregon and that he could not be found within the state without stating any facts supporting the ultimate conclusion and showing diligent search on the part of plaintiff. This affidavit was considered insufficient under Oregon law by the trial Court, and the trial Court for that reason declared the judgment void. The United States Supreme Court in passing on this decision did not disagree with the trial Court

in that the affidavit was insufficient under state law. However, assuming that the affidavit for publication in stating only ultimate facts and not showing diligence at all, was defective under state law, *the Supreme Court expressed its opinion that defects in an affidavit of publication of summons under state law "can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally"*. Second, it is true that in the case of *Pennoyer v. Neff,* supra, the affidavit was defective according to Oregon law. However, it is a fact which can be taken from the quotation of the Oregon statute in the trial Court's decision, that the Oregon law was identical with the present and the former California law. In fact the trial Court in its decision, which in this point was disapproved by the U. S. Supreme Court, did not cite Oregon cases but California cases for the sufficiency of the affidavit, among them *Ricketson v. Richardson,* 26 Cal. 149, one of the California cases relied on by appellee. Moreover, it is apparently irrelevant whether the defect of the affidavit exists under Oregon law or under California law where the sole question is whether, assuming it to be defective under any state law this is sufficient under federal precedent to make a judgment a nullity.

The other case which we have cited along with *Pennoyer v. Neff* is *Thompson v. Thompson,* 226 U. S. 551, 57 L. ed. 247. We were aware of the fact (cited on pages 22-23 of our opening brief), that in the *Thompson* case the United States Supreme Court reached the conclusion that an affidavit which was

entirely made on information and belief could be used as the foundation for an order for publication of summons under Virginia law. (This holding of the U. S. Supreme Court incidentally shows that the admission of a hearsay affidavit for publication of service is not contrary to due process of law.) However, the Court expressly states a separate ground for its decision, to-wit, that even if an affidavit based upon information and belief for the publication of service would be insufficient under Virginia law "it seems well settled" that a judgment does not become *coram non judice* and therefore void on its face because the affidavit for publication is defective "not in omitting to state the material fact but in the mode of stating it or in the degree of proof".

This is *not an obiter dictum* of the Court (which would also be entitled to the highest respect) but is clearly an alternative ground of the decision and so establishes a binding precedent. (*United States v. Title Insurance and Trust Co.,* 265 U. S. 472, 486, 68 L. ed. 1110, 1114.) It is true that at the end of the opinion the Supreme Court comes back to the first ground—that the local law did not exclude the use of such an affidavit. However, the fact that the Court repeated its first conclusion does not eliminate the alternative ground on which its decision is likewise based. Appellee's further comment on the *Thompson* case is to the effect (page 32 of her brief) that had the United States Supreme Court's attention in *Thompson v. Thompson,* supra, been called to the California cases of *Kahn v. Matthai,* 115 Cal. 689, and *In re Behymer,* 130 Cal. App. 200, it would have

had to admit that such was not the law in California. We presume that the United States Supreme Court would have disregarded appellee's proposition, because *Kahn v. Matthai* is a case where a direct attack, and not a collateral attack, was made on a judgment, and the opinion expressly limits the holding to such a type of attack. *In re Behymer* is a decision of a District Court of Appeal, the holding of which is entirely based on *Kahn v. Matthai* where the Court, however, overlooked that the California Supreme Court at all times has distinguished between direct and collateral attack on a judgment in its examination of the sufficiency of affidavits and other requisites of service. (See pages 16 to 21 of this brief.) However, we believe it is entirely immaterial to speculate on the question what the United States Supreme Court "would have had to admit". We are here concerned with a clear precedent contained in a United States Supreme Court decision which seems to us above the discussion of speculative eventualities.

To the same effect as *Pennoyer v. Neff,* supra, and the *Thompson* case, supra, are the following cases:

Cohen v. Portland Lodge No. 142, 152 Fed. 357, which was a case decided by this Court in which a judgment was attacked because of insufficiency of the affidavit for publication of summons. The Court, from a discussion of the affidavit, found "that both probative facts and legitimate inferences of non-residence appeared in the affidavit submitted to the Court". (p. 364.) Then the Court, distinguishing between "conditions of partial and of total failure", said (p. 364):

> "Absolute deficiency must exist, however, in the affidavit examined here to warrant the court in ruling that the judgment of the state court was a nullity. And we do not find an absolute deficiency. The affidavit is far more complete than that made by the affiant in the case of Neff v. Pennoyer, 3 Sawy. 274, Fed. Cases 10083; yet upon appeal the Supreme Court (95 U.S. 721, 24 L. ed. 565), discussing the statute under which the court made its order, said: 'There is some difference of opinion among the members of this Court as to the rulings upon these alleged defects. The majority are of the opinion that inasmuch as the statute requires for an order of publication that said facts shall appear by affidavit to the satisfaction of the court or judge, defects in such an affidavit can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally. * * * If therefore we were confined to the ruling of the court below upon the defects in the affidavit mentioned, we should be unable to uphold its decision.' "

We further cite the case of *Bull v. Campbell,* 225 Fed. 923, where plaintiff's affidavit for the publication of summons recited that defendant could not, after due diligence, be found within the state, that the sheriff had returned the service with his endorsement thereon that the defendant could not be found, and that the affiant "is informed and believes that the said defendant J. Warren Coulston resides at Philadelphia in the State of Pennsylvania". It was claimed by defendant in his attack upon the judgment that it was a nullity because the affidavit upon which the

order was made did not comply with the terms of the statutes of the Territory of Dakota then in force on the subject of constructive service. The statute set forth by the Court in its decision was practically identical with the present California statute. The Court said (at page 929):

> "It may be conceded that upon an appeal from a decree entered upon such an affidavit it would be declared insufficient to warrant an order of the court for substituted service, a question not before us and therefore not determined; but it would not follow that a decree based upon such an affidavit and order would make the decree absolutely void, so that it could be attacked in a collateral proceeding. No authority has been called to our attention in the very elaborate brief of counsel for defendant, nor in the oral argument, to any decision of the Supreme Court of the Territory of Dakota or the State of Sorth Dakota, where such a judgment or decree has been declared void when collaterally attacked, nor have we been able to find any such authority. The court which acted on the affidavit held it sufficient and if it erred the error can only be corrected by appeal. The decree cannot be attacked collaterally. Applegate v. Mining Co., 117 U.S. 255, 29 L. Ed. 892; Pennoyer v. Neff, 95 U.S. 714, 721, 24 L. ed. 565."

Then the Court cites the relevant holding in *Pennoyer v. Neff,* supra, and calls attention to the fact that in the United States Supreme Court's decision in *Pennoyer v. Neff,* it appears in italics that the Oregon statute requires, before an order for publication be made, that the relevant facts appear by affi-

davit to the satisfaction of the Court or judge. Referring to Sec. 412 of the California Code of Civil Procedure, we call attention to the fact that the same words which were italicized by the U. S. Supreme Court appear in the California statute. The case of *Bull v. Campbell,* at page 929, refers to *Marx v. Ebner,* 180 U. S. 314, 319, 45 L. ed. 547. In that case the affidavit was almost identical and the language of the statute practically the same. The Court therefore cites from *Marx v. Ebner,* supra, as follows:

> "We think, where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders, and there is a certificate of the marshal such as appears in this case."

In *Galpin v. Page,* 85 U. S. 350, 21 L. ed. 959 (referred to on p. 38 of appellee's brief), a different

question was before the Court in a case where service by publication was made on a non-resident of the state charging his property in the state. In that case plaintiff had never made an application to the Court for an order granting his publication of service. The Court held that there was no service of process upon which a judgment standing up against collateral attack could be based, since the publication of service "was the voluntary act of complainant without judicial authority or sanction". (21 L. ed. at p. 961.)

In the cases of *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, and *Stoll v. Gottlieb*, 305 U. S. 165, 93 L. ed. 104, 111 (see pages 15-16 of our opening brief), the Court distinguished between strictly jurisdictional facts, the lack of which makes a judgment a nullity, and quasi-jurisdictional facts which are not subject to collateral attack. Appellee, on page 12 of her brief, claims that her present attack on the judgment of the District Court relates to strictly jurisdictional facts in the meaning of two categories listed in the *Noble* case, to-wit, "the service of process within the state upon the defendant in a common law action" and "a publication in strict accordance with the statute where the property of an absent defendant is sought to be charged".

The first of these categories relates to personal service on the defendant within the state in a common law action. The quotations of the Court following this category show that the Court referred to the rule that defendant cannot be reached outside the state by personal service in the common law sense, and that

such service outside the state does not subject the defendant to the jurisdiction of the Court. In the instant case the jurisdiction of the Court is not based on personal service outside the state nor on any kind of personal service in the common law sense so that this category referred to in the *Noble* case as one where strictly jurisdictional facts are in issue, does not apply.

The second category, referred to by appellee, relates to jurisdiction where the publication is made against an absent defendant and because there is property of such defendant in the state which is sought to be charged. The language of the Court in determining this category and the citations following it clearly show that this category refers to the familiar situation where a non-resident, although not personally subject to the jurisdiction of the Court, is made a defendant with respect to property which he holds within the state and which is sought to be charged.

In the present case, the jurisdiction of the Court was not based on the fact that defendant, was a non-resident and owned property within the state but on the ground that defendant was a resident of the state which is sufficient to bring her within reach of the jurisdiction of the Courts in the state by substituted service and even by personal service without the state. In the case of *Milliken v. Meyer,* 311 U. S. 457, 85 L. ed. 278, the Court points out:

> "As in the case of the authority of the United States over its absent citizens (Blackmer v. U.

> S., 284 U.S. 421, 76 L. ed. 375) the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile, may also exact reciprocal duties."

According to this fundamental notion, a resident of a state, even if he is temporarily absent, remains within the reach of the state's jurisdiction for purposes of a personal judgment and can be served by appropriate substituted service. The Court has recognized that in such a case the service is adequate so far as due process is concerned, even where the defendant was personally served without the state.

From a reading of the case of *Milliken v. Meyer,* supra, it becomes clear why the Court, in the list of strictly jurisdictional facts in the *Noble* case, does not include the category of publication of service in cases where a resident defendant is served by publication because he cannot be found within the state. The *Noble* case also apparently could not include this type of facts in the list of strictly jurisdictional facts because *Pennoyer v. Neff,* supra, and *Thompson v. Thompson,* supra, clearly indicate that defects of an affidavit in such a case are not sufficient to make the judgment void.

In our quotations of federal authorities we have not distinguished between those where publication of service was made to charge the *property* of a nonresident defendant and where constructive service

was made against a *resident defendant* because of temporary absence from the state, because the cases relating to constructive service where the property of an absent defendant is to be charged, are clearly to the effect that defects in the affidavit for publication of summons do not render a judgment a nullity even in that type of case. (See *Marx v. Ebner,* supra.)

The reason why we pointed out in our opening brief, as well as in the present brief, that the question of whether the judgment is a nullity is governed by federal law, has been misunderstood by appellee, since she claims that we are "fighting shy" of California citations (page 27 of her brief). As the authorities are clearly to the effect that federal law governs, we believe that California authorities on this point can only be of interest as they follow the same rule as the federal Courts.

Having this limited purpose in mind we are discussing the California cases which clearly distinguish between direct and collateral attack on a judgment holding that in the case of a direct attack an affidavit for publication of service can be scrutinized whereas this cannot be done where a judgment is final and the attack is a collateral one.

This rule was clearly expressed in the recent case of *City of Salinas v. Lee,* 217 Cal. 252, 255, where the Court said that an attack made after expiration of the period prescribed in Sec. 473 of the California Code of Civil Procedure, is governed by the rules applicable to collateral attack, and therefore must be presented and determined upon the judgment roll

alone. However, the fact that the judgment roll alone can be resorted to is by no means the only effect under California law of the applicability of the rules for collateral attack. The Court in the *City of Salinas* case squarely holds that upon collateral attack "every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it." (p. 256.)

In the case of *Kaufmann v. California Mining etc. Syn.,* 16 Cal. (2d) 90, the Court refuses to give consideration to the authorities cited by appellants involving direct attacks rather than collateral attacks upon judgments. In support of the presumption in favor of the validity of the judgment, relied on in the *City of Salinas* case, the Court points out that where it does not affirmatively appear from the judgment that the findings were based solely upon any particular document or documents relating to service of summons, the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack "even though there may have been defects in some of the documents constituting a part of the judgment roll and relating to the service of summons". The Court cites *Hahn v. Kelly,* 34 Cal. 391, *Musser v. Fitting,* 26 Cal. App. 746, and other California cases for the doctrine that upon collateral attack the jurisdictional recitals in the judgment are considered to be conclusive proof of service, and that if the proof of service on record is defective in view of such recitals, it is presumed "that the court had other

sufficient proof of service than that which remains on file".

It appears from the foregoing that appellee is wrong in her assumption that the only difference in California between a direct attack and a collateral attack is that upon the former form of attack extrinsic evidence can be submitted, while upon the latter only evidence which appears from the record. (See appellee's brief, p. 13.) It is true that this is one factor distinguishing both types of attack, but it is by no means the only factor which is important under California law. Appellee tries to distinguish the *Kaufmann* case, supra, from the present case (see p. 43 of her brief) in that under the facts of the *Kaufmann* case service was attempted not only by publication but also by service upon the secretary of state and by attachment. However, the *Kaufmann* case, supra, at pages 91-92, expressly cites with approval *Rue v. Quinn,* 137 Cal. 657, for the rule that the ordinary rules governing a direct attack have no bearing under the circumstances. *Rue v. Quinn,* supra, dealt with alleged defects of an affidavit for an order granting publication of service. There it was said that the recitals of a judgment are conclusive and that the law will presume that the Court had other sufficient proof of service than that which remains on file if the papers on record would show a defective and void service.

The *Kaufmann* case, adopting these former holdings of *Rue v. Quinn,* supra, is the latest decision in point in California, and it seems to us that under

this decision upon collateral attack the presumption in favor of the validity of the judgment will always protect the judgment where the recitals of the judgment are not such that they negative the sufficiency of the service.

The cases of *Ricketson v. Richardson,* supra, and *Columbia Screw Co. v. Warner Lock Co.,* 138 Cal. 445, are cases where the judgment was directly attacked so that the rules applicable were different. In the case of *Braley v. Seaman,* 30 Cal. 610, it also appears that the judgment was attacked upon appeal by the defendant.

It is therefore of particular interest to note the difference in the rules applied by the Court in *Rue v. Quinn,* supra, a case where the attack was collateral, from those rules which the same Court had formerly applied in *Ricketson v. Richardson,* supra, and *Braley v. Seaman,* supra, upon direct attack. The case of *Kahn v. Matthai,* supra, is likewise a case of direct attack upon a judgment, and it was thereafter held in *Rue v. Quinn,* supra, at p. 656, that even though under the authority of *Kahn v. Matthai,* supra, upon an attack within the period prescribed by Sec. 473 of the California Code of Civil Procedure, the order for publication of service possibly could have been reviewed upon the ground that the evidence was insufficient to justify the finding of due diligence, *Kahn v. Matthai,* supra, was no authority because the motion was not made until after the time for an appeal had expired.

In fact, the case of *Rue v. Quinn,* supra, makes it impossible to cite *Kahn v. Matthai,* supra, as a California authority in connection with collateral attack on a judgment. This leaves the case of *In re Behymer,* supra (a decision of a California District Court of Appeal), the only authority in California where upon collateral attack a judgment was declared void because of defects in an affidavit for the publication of summons. In that case the plaintiff had used a form-blank for the affidavit for publication of summons and had claimed as present all four alternatives mentioned in Sec. 412 of the Code of Civil Procedure (which in itself made the affidavit contradictory). The affidavit then stated that plaintiff had employed a certain McClaflin to ascertain the whereabouts of the defendants, and was informed by him that he could not find any of the officers of the defendant corporation, and that the corporation had defaulted its charter and was not now in existence. In addition thereto the affidavit stated that affiant had interviewed the city assessor, the tax collector, and the city clerk of Long Beach, California (where said corporation had its principal office) and the Alamitos Land Co., who owned property near the property of the defendant corporation, but could not learn from any of them the whereabouts of any of the defendants.

The Court based its judgment mainly on two points, to-wit, (1) insufficiency of the affidavit in that *all the statements* showing diligence were hearsay, and (2) that where service of process upon a defendant within the county is attempted to be made by a person other

than the sheriff, his affidavit should *as a rule* be required showing the nature of the effort made to serve the party.

The reason for the Court's decision is not given in its own language but it cites verbatim the language of the California Supreme Court in *Kahn v. Matthai,* supra. It is apparent from this citation and the Court's silence on the case of *Rue v. Quinn,* supra, that the District Court of Appeal entirely overlooked that *Kahn v. Matthai,* supra, was a decision in a case limited to a direct attack on a judgment and that the California Supreme Court, construing its own decision in *Kahn v. Matthai,* supra, had expressly stated in *Rue v. Quinn,* supra, that *Kahn v. Matthai,* supra, was not applicable to a collateral attack upon a judgment. The fact that the District Court of Appeal did not even cite the previous decision of *Rue v. Quinn,* supra, makes it clear that the Court's attention had not been called to the case of *Rue v. Quinn,* supra, which is still the representative authority in California on the subject and which was approved in the most recent case of *Kaufmann v. California Mining Co.,* supra.

But even disregarding the fact that the case of *In re Behymer* is entirely based on its citations from *Kahn v. Matthai,* supra, which was not applicable, it also appears that the Court limited its decision to a case where *all* the statements showing diligence were hearsay and where no attempt by the sheriff to serve process had been made. In both respects the case of *In re Behymer* is clearly distinguishable from the present case.

IV.

THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE FOR AN ORDER OF PUBLICATION OF SERVICE.

Appellee states on page 44 of her brief that an affidavit is the *only* evidence which is admissible for an order for publication of service under Sec. 412 of the California Civil Code. However, appellee is not able to cite any California authority bearing out her contention, and the only authority which she cites to the Court that even a sheriff's return can not be considered unless in affidavit form, is *Grigsby v. Wopschall,* 127 N.W. 605. We do not believe that the California law on service by publication can be proven by a citation from another jurisdiction where in fact it has been said that a sheriff's return cannot be considered unless in the form of an affidavit made for publication of service. The California decisions and the federal decisions are *unanimous* to the effect that the sheriff's or marshal's certificate is admissible proof for publication of service even where the statute (as the California statute does) provides the facts to appear "by the affidavit" to the satisfaction of the Court or judge or justice thereof.

The question was given special attention by the United States Supreme Court in *Marx v. Ebner,* supra, where the Court dealt with the Alaska statute which is quoted in its decision and which is practically identical with the California statute on this point. The Court in that case held that along with the affidavit which showed that the defendant was a non-resident of the district and that personal service could not be made upon him, the marshal's or other

public officer's return (to whom the summons was delivered) could be considered as evidence that after due and diligent search defendant could not be found; and discussing the weight of the marshal's certificate, the Court states at the end of the opinion (45 L. ed. at p. 550):

> "Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the state, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Some such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of an official duty."

In the case of *Cohen v. Portland Lodge No. 142*, supra, this Court applying the Oregon statute which was identical with the present California statute, said:

> "This is affiant's statement of the substance of the record in the case; yet it is fairly entitled to be accepted as an accurate resume of what the record shows, made by an attorney of the court. This statement is evidence, though subject to the criticism that it is not of as good quality or grade

> of evidence as the record itself would have been had copy thereof been incorporated as part of the affidavit. But it was not necessarily inadmissible solely on that account, and the court was justified in attaching to the declaration of the affiant such importance and weight as it would have given to the record return by the sheriff. When weighed by the court the official statement by the sheriff touching the things he was required by law to do by way of serving the defendant in the mortgage foreclosure suit with process, was at least prima facie evidence of the defendant's absence from that county in the state wherein the sheriff exercised official authority." (152 Fed. at p. 362.)

In the instant case the marshal's return was a part of the record and before the Court when it made the order for publication of service which order expressly recites: "And it further appearing to the satisfaction of the judge from said affidavit and from other evidence." (Tr. p. 60.) Moreover, Herrington's affidavit incorporates by reference the marshal's return. (Tr. p. 50.)

The following California cases clearly admit the sheriff's certificate as evidence:

Rue v. Quinn, supra, where the Court says, at the bottom of page 657:

> "The sheriff's return may be relied upon as part of the evidence that the defendant cannot be found within the county * * *."

Weis v. Cain (Cal.), 73 Pac. 980, which case held that under California law upon collateral attack, an

affidavit for the service of summons by publication was sufficient which stated that the summons had been placed in the hands of the sheriff of the county for service, that the sheriff had returned it with his return endorsed thereon to the effect that he could not find the defendant within the county, and that affiant did not know the residence of the defendant.

In the case of *Clarkin v. Morris,* 178 Cal. 102, 104, the affiant stated no affidavit of the sheriff being submitted that the summons had been given to the sheriff with instructions to serve the same on said defendant, and that his return thereon had stated that he could not find the said defendant in the county of Los Angeles. The Court admitted this proof referring to the case of *Rue v. Quinn,* supra, where "the affidavit in controversy stated the return of the Sheriff similar to that in the present case".

Also in the case of *Ligare v. California S. R. R. Co.,* 76 Cal. 610, at page 612, diligence was proven by an affidavit that the summons and alias summonses had been placed in the hands of the sheriff of a certain county, and thereafter in the hands of other sheriffs, with instructions to make service but that they all had returned the summonses with endorsed returns thereon or written responses that they had made diligent inquiry and search within their counties and could not find any of the defendants. (See the quotation from the the *Ligare* case on pp. 36-37 of our opening brief.)

From this case it will be noted that the Court not only did admit the certificate of the sheriff as evi-

dence, but also the statements in the affidavit that the sheriffs had returned the summonses with their writs endorsed thereon *or written responses.* Therefore in this case not only an official certificate but also written responses of the sheriffs were considered good evidence, as cited by affiant in his affidavit. We make special reference to this point because Herrington's affidavit not only incorporates by reference the marshal's return but also states extensively the written responses received from the marshal which clearly indicate due diligence on the part of the appellants, and also that appellee was concealing herself to avoid service.

V.

IN A COLLATERAL ATTACK THE RECITALS OF THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE.

The default judgment of the District Court recites (Tr. p. 67):

> "The defendant Grace Appleton McKey, sued herein * * * having been duly and regularly served with summons * * *."

The order for publication of summons (Tr. p. 60) recites:

> "And it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the court finds that * * * diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this court in order to

> serve said subpoena and said alias subpoena upon her, and that said defendant cannot, after due diligence be found within the State of California or the jurisdiction of this court, and that said defendant has been and now is concealing herself to avoid the service of said process."

The recitals of the judgment show due service without specifying how the service was made.

Therefore, what has been said in *Hahn v. Kelly,* supra, applies: that if the judgment recites due service of process without specifying how the service was made or referring to any paper as proof of it, the recital is conclusive on the parties in a collateral proceeding. Also in point is the following citation from the *City of Salinas v. Lee* case, supra (p. 256):

> "It does not appear that said recital was at all based upon the original and deficient affidavit of publication. It may well be that prior to or at the time of the entry of judgment it was made to appear to the trial court *by other means* that due publication of summons had been had. It will therefore be presumed in support of the judgment, and in conformity with the above cited cases, that *proof other than the original affidavit was introduced satisfying the court below of the fact of due and proper service of the defendant and of the regularity of the default."* (Italics ours.)

Appellee seems to rely on the theory that a diligent search for defendant and the fact that defendant concealed herself to avoid service can be proved under Sec. 412 of the California Code of Civil Procedure

only by affidavit so that the Court cannot rely on anything but an affidavit and the recital in the judgment can only therefore refer to an affidavit on record. Appellee tries to distinguish the present case where an affidavit to obtain an order of publication of service is under scrutiny from the other cases where an affidavit of publication is claimed to be defective. However, Sec. 415, subdivision 3 of the Code of Civil Procedure provides that in the case of service by publication, proof of service of summons and complaint "must be" by the affidavit of the printer and other persons named in said subdivision. There is therefore no difference with reference to an affidavit under Sec. 412 dealing with and serving as proof for the grounds of service by publication, and under Sec. 415 serving as proof for the publication. In both cases the California Courts have construed the law to mean that in the case of a collateral attack it shall be presumed that if the affidavit for publication or the affidavit of publication is defective, other proof than that by affidavit was before the Court, and that such proof was not defective and insufficient. In other words, the California Courts in cases of collateral attack consider the recitals of due service in the judgment as binding even if the papers on record are defective. They base their holding on the presumption that other satisfactory proof has been before the judge or Court. The recitals of the judgment can only be disregarded where the lack of jurisdiction *affirmatively* appears from the record.

As the Court said in the most recent case (*Kaufmann v. California Mining Synd.,* supra, at p. 93):

> "It does not *affirmatively* appear that these findings were based solely upon any particular document or documents relating to service of summons, and under these circumstances the presumptions in favor of the validity of the judgment made said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting a part of the judgment roll and relating to the service of summons."

The *Kaufmann* case, at page 93, in support of this statement, refers to *Hahn v. Kelly,* supra (p. 431) where the Court had distinguished between a judgment referring for proof of service generally to a paper or papers on file where the presumption would be that the Court had other sufficient proof of service than that which remains on file, and the case where the judgment recites due service of process without specifying how the process was made, or referring to any paper as proof of it where "the recital is conclusive on the parties in a collateral process". The *Kaufmann* case, relying on this and other quotations, makes it perfectly clear what is meant by the holding that the collateral attack "must fail unless the invalidity of that judgment affirmatively appears upon the face of the judgment roll": the judgment must affirmatively refer, as its sole basis, to a document which shows irregularity of the proof of default or improper service, or the judgment itself must affirmatively show such defects. So long as the judgment either refers generally to the papers on record or not even naming the papers on record, it must be

presumed that there was other proof before the Court than that still on record. Mere defects in a paper on record can, under these circumstances, in no case affirmatively show irregularity in obtaining or performing the publication of service.

Appellee remains silent on the *Hahn v. Kelly* case and tries to distinguish the *Kaufmann* case because there the service was attempted not only by publication but also by other means. However, it cannot be seen why the recitals of the judgment should be binding and conclusive if service has been tried one way and lack conclusiveness if another mode of service has been attempted.

The *Kaufmann* case clearly indicates that the conclusiveness of the recitals of due process in the judgment applies to all three modes of service which were attempted in the *Kaufmann* case, therefore the service by publication was one of those attempted modes of service.

It follows that also the cases of *Rue v. Quinn,* supra, *Musser v. Fitting,* supra, *City of Salinas v. Lee,* supra, and *Sacramento Bank v. Montgomery,* 146 Cal. 745 at pages 750, 751 (which are cited in the *Kaufmann* case), are in point, and that the holdings in those cases that the recital of due service must be taken as true, covers all types of service and all steps necessary to accomplish service of process.

In the case of *Rue v. Quinn,* supra, the Court refers at page 655 to the order directing the publication of service in which the judge recited "that it satisfactorily appeared to him from the said affidavit that

the defendant Louisa Munro could not after due diligence be found within said state * * *." Referring to this case the Court says at page 656: "If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination."

Likewise the case of *Ballard v. Hunter,* 204 U. S. 241, 51 L. ed. 461, is in point since the California decisions show that lack of defects in an affidavit for publication of service is not a jurisdictional requirement and that jurisdiction can be obtained even if the affidavit was defective.

VI.

HERRINGTON'S AFFIDAVIT WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS EVEN UPON A DIRECT ATTACK UPON THE JUDGMENT.

Appellee's brief (see p. 1) contains the statement that the order for publication of summons was procured by an affidavit "which recited the purported unsuccessful efforts of a specially hired process server in Los Angeles, and *to a slight degree* the efforts of *a deputy marshal* to locate and serve appellee, de-

fendant". (Italics ours.) Appellee regards all statements concerning the activities of the process server and the deputy marshal as entirely hearsay, and concludes, on page 37 of her brief, as follows: "We do not believe an affidavit could be found on the books more afflicted with hearsay." We do believe, in fairness, that these statements do an injustice to Herrington's affidavit, and we therefore find it necessary to analyze his affidavit.

For the purpose of analysis of Herrington's affidavit, we distinguish three parts of the affidavit:

(A) Herrington's statements on the instructions given by him to the marshal and on the marshal's return and written responses;

(B) Herrington's statements on the instructions given by him to Leo K. Gold regarding service of process on appellee, and Gold's written reports on the failure of his efforts to serve appellee;

(C) Herrington's statements on the diligent search made by him and the other attorneys for appellants and on the fact that appellee concealed herself to avoid service, and that he and the other attorneys for appellants were unable to locate defendant.

A.

HERRINGTON'S STATEMENTS ON THE INSTRUCTIONS GIVEN BY HIM TO THE MARSHAL AND ON THE MARSHAL'S RETURN AND WRITTEN RESPONSES.

Herrington states in his affidavit that he had been informed by the receiver of the insolvent bank that the books and records of the bank showed 1550 North

Fairfax Avenue, Hollywood, as appellee's address. (Tr. p. 46.) He further informed the marshal that Leo K. Gold, employed by Herrington as private investigator, had advised him of another address of appellee to which she had moved from said Hollywood address, to-wit, 116 So. Clybourne Street, Burbank, California. (Tr. p. 48.) These instructions given by Herrington to the marshal are stated in his affidavit as facts being known to Herrington.

Appellee's own affidavit in support of her motion (Tr. p. 76) shows that she claims to have resided during the time service was attempted at 1550 No. Fairfax Avenue, Los Angeles, or 116 So. Clybourne Street, Burbank. Thus appellee, by her own statement, indicates that Herrington's instructions to the marshal as to appellee's address in the state were correct, so that by no greater degree of diligence could Herrington have given better instructions to the marshal.

The marshal himself advised Herrington (Tr. p. 47) he had ascertained that appellee received her mail at 119 24th Street, Hermosa Beach, California, at which last mentioned address another of the defendants in the suit, namely Kathryn Riddell, resided, and at which address said Kathryn Riddell was served with process by the marshal. (See Herrington's affidavit, Tr. p. 49, and the marshal's return on service upon Kathryn Riddell, Tr. p. 40.) Under Herrington's instructions to the marshal which are stated in detail in the affidavit, the marshal attempted to serve the subpoena upon appellee at all three ad-

dresses above referred to. (See Tr. p. 48, where Herrington in his affidavit states as follows):

> "That on or about January 27, 1937, said marshal wrote affiant that he had made several attempts by three different deputy marshals, to serve said defendant at 111 and 116 South Clybourne Street, Burbank, California, and also at 119 Twenty-fourth Street, Hermosa Beach, California, and also at 1550 Fairfax Avenue, Hollywood, California, and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts; said marshal also stated that he was attempting to serve said defendant in another action for some Los Angeles attorneys."

After having spent two months in such attempts to serve appellee at one of the above addresses, the marshal wrote on February 26, 1937, as stated in the affidavit, that he had definitely established that appellee was residing at the address known as 119 Twenty-fourth Street, Hermosa Beach (Tr. pp. 49-50), but that in spite of three different trips made by his deputy he had been unable to serve appellee because no one had responded or answered the door on the calls. (Tr. p. 50.) After more than two months of futile attempts to serve appellee at those addresses, the marshal advised affiant and the other attorneys, as is again stated in the affidavit, that he considered his efforts unsuccessful and therefore believed it advisable to return the subpoena to the clerk with an affidavit showing his inability to serve appellee. (Tr. p. 50.) The affidavit further states the suggestion

by the marshal to move the Court to appoint Leo K. Gold, who co-operated with the marshal's office for the purpose of serving appellee, as the person to make service. The affidavit finally incorporated by reference the marshal's return which is composed of three returns by three different deputy marshals who had tried to serve appellee. (Tr. pp. 36, 37, 50.)

B.

HERRINGTON'S STATEMENTS ON THE INSTRUCTIONS GIVEN BY HIM TO LEO K. GOLD REGARDING SERVICE OF PROCESS ON APPELLEE, AND GOLD'S WRITTEN REPORTS ON THE FAILURE OF HIS EFFORTS TO SERVE APPELLEE.

As to Leo K. Gold's prior efforts to assist the marshal in serving appellee, the affidavit states that Leo K. Gold had furnished the above Burbank address of appellee (Tr. p. 48) and that he had so enabled affiant to give this address to the marshal.

The affidavit further states (Tr. p. 49) that affiant had been informed by Leo K. Gold that appellee and Kathryn Riddell, who was served as defendant in the same action, were sisters-in-law (Tr. p. 40) and therefore affiant upon information and belief alleges that appellee learned of the pendency of the suit and anticipated she would be served as a defendant therein and that she therefore concealed herself to avoid service.

After the order of Court officially appointing Gold to serve process according to Herrington's affidavit, Leo K. Gold on April 1, 1937, accepted receipt of the alias subpoena and reported in writing to affiant that he was endeavoring to serve the same on appellee

at the various addresses above referred to. The affidavit states on written reports of Leo K. Gold, relating to his efforts to serve process as of the following dates: March 16, 1937, April 1, 1937, April 5, 1937, April 27, 1937, June 25, 1937, September 14, 1937, September 24, 1937, November 6, 1937, November 19, 1937, June 11, 1938, August 19, 1938. (Tr. pp. 51-56.) All of these reports of Gold dealt with intensive and constant efforts made by the Court's officially appointed process server to achieve service. The affidavit states that according to his written reports Gold inquired from neighbors at the various addresses that he tried to find out the telephone number where appellee could be reached; that he examined the Los Angeles city directory going back a number of years; that he made inquiries of the tax collector's office at Hermosa Beach and found that Kathryn Riddell had instructed the tax collector to send her the tax bills on the Hermosa Beach property and also on the Burbank property (which was one of the addresses of appellee) although said properties were recorded in the name of Elizabeth Gordon. (Tr. p. 54.)

Affiant further states (Tr. p. 55) that on or about December, 1937, he learned that the law firm of Meserve, Mumper, Hughes and Robertson, with offices at 555 So. Flower Street, Los Angeles, were attorneys for certain plaintiffs in a suit in the Federal Court at Los Angeles, in which appellee was a defendant, and that they were endeavoring to effect service of process in said action upon appellee. Affiant further states, as a matter of his own knowledge, that he inquired of those attorneys concerning the whereabouts

of appellee and received from them a letter dated December 11, 1937, stating that they had made numerous attempts to effect service of process on appellee but without success; that a deputy U. S. Marshal had made several trips to the aforementioned Hermosa Beach address and the Burbank address without succeeding in contacting or serving appellee, and also that they had sent out their office clerks on a number of different occasions to said addresses to locate appellee. Affiant states (Tr. p. 56) as a matter of his own knowledge that a few months thereafter (in August 1939) he gave Leo K. Gold this information which he had received and suggested that to assist in locating appellee he call at the office of these Los Angeles attorneys to inquire of them if they had had any better success in locating or serving said defendant in the action they were handling. (Tr. p. 56.) Affiant again, as a matter of his own knowledge, states that in response to this letter which he had directed to Leo K. Gold he received Gold's answer under date of August, 1938, stating that Gold had followed the instructions given by affiant and that he had been informed by the attorneys that they were still trying to locate and serve appellee. Affiant states in the same letter he was informed by Gold that he had completely re-covered the ground covered during the past year in attempting to locate appellee and also Kathryn Riddell, and that according to his written report Gold had searched and rechecked the city directory and the telephone directory, also the newly compiled voters' register, without finding any additional clues as to the whereabouts of appellee and Kathryn Riddell. (Tr. p. 56.)

C.

HERRRINGTON'S STATEMENTS ON THE DILIGENT SEARCH MADE BY HIM AND THE OTHER ATTORNEYS FOR APPELLANTS AND ON THE FACT THAT APPELLEE CONCEALED HERSELF TO AVOID SERVICE, AND THAT HE AND THE OTHER ATTORNEYS FOR APPELLANTS WERE UNABLE TO LOCATE DEFENDANT.

Toward the end of his very explicit and detailed affidavit, Herrington makes the following statements (Tr. pp. 56-57):

> "That in view of the foregoing, affiant and plaintiff's attorneys have decided it would be futile to spend further time, effort, and money in an attempt to effect personal service of process on said defendant."

Affiant then swears to the fact

> "that said defendant Grace Appleton McKey cannot, after due diligence, be found within the State of California and cannot personally be served with subpoena or other process in this suit."

Affiant also swears

> "that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe, they would receive information as to the whereabouts of said defendant; that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts * * *."

Upon his information and belief affiant swears to the fact

> "that said defendant at all times since the commencement of this action has been and now is concealing herself to avoid the process of subpoena and other process herein, and that she will continue to so conceal herself for the purpose aforesaid."

All these allegations in the affidavit (Tr. p. 57) are co-ordinated with each other and by no means are subordinated to the statement that in view of the statements made in the foregoing parts of the affidavit affiant's and plaintiff's attorneys had decided that further efforts to serve appellee would be unavailing.

On pages 37 and 50 of her brief appellee comments on Herrington's statements in his affidavit which are neither hearsay nor to a large and decisive part made on information and belief, and she accuses us of having "conveniently overlooked" the fact which appellee had to call to the Court's attention that Herrington prefaced his foregoing statements in his affidavit with the statement "that in view of the foregoing" affiant and the other attorneys of plaintiff had decided that further efforts to effect personal service of process on appellee would be futile. However, appellee entirely overlooks that the five statements appearing in that paragraph of Herrington's affidavit which starts at the bottom of page 56 of the transcript and ends at the bottom of page 57, are independent statements. They all commence with the word "that"; each of them is severed from the foregoing by a semicolon. The first statement gives the

reason why affiant and the other attorneys for plaintiff were at that time moving the Court to grant publication of service. The second statement gives the general conclusion that appellee cannot be found after due diligence within the State of California. The third statement, made on information and belief, is again an independent statement, in which affiant upon information and belief swears to the fact that appellee was concealing herself to avoid service. The fourth independent statement, based upon the affiant's own knowledge, assures the Court that affiant and his colleagues have done everything in their power to serve appellee with process, and that they for that purpose made diligent search and made inquiry of each and every person whom they had any reason to believe would receive information as to the whereabouts of defendant (this affidavit being made after more than two years' effort). The fifth statement is also independent and absolutely necessary in a case of this sort in that it assures the Court that affiant and the other attorneys for plaintiff are not aware of the whereabouts of defendant and cannot learn them. Each of these statements must be taken independent of the other. Herrington swore without any limitations that he was unable to ascertain the whereabouts of appellee; he likewise swore that diligent search had been made by him inquiring of each and every person from whom he could expect or had reason to believe that he would receive information as to appellee's whereabouts. He did not limit in any way his statements covering all his efforts to locate appellee.

Appellee's attempt to redraft Herrington's affidavit so as to make it more cautious than it is, is futile in view of the clear language used by the affiant. This language exposed him to punishment for perjury if any of his statements were incorrect or false.

D.

CONCLUSION.

We believe that Herrington's affidavit can be most aptly characterized by the language which this Court used in *Cohen v. Portland Lodge,* supra, at page 363:

> "We agree that behind each of the material probative facts there should stand the affidavit of some one who can be subjected to the pains and penalties of perjury if his affidavit is criminally false, but we disagree with the view that perjury might not be committed. Let us apply the test of a possible charge of perjury. If affiant willfully and corruptly swore that he received the information stated when in truth he had not, and willfully swore that because of the information personal service could not be had, we think he corruptly stated as an ultimate fact that which he could swear to based upon information received, and that, if he knowingly falsely stated the ultimate fact, he would be criminally liable in perjury. So when the several parts of the affidavit are considered we should include the ultimate fact which is in itself positively made, that personal service was not to be had because of the antecedent facts; and when we do so regard it our opinion is that as a whole it contained a sufficient showing for the court to have acted upon."

The authority in California law on which appellee mainly relies is the case of *Kahn v. Matthai,* supra.

where the Court expressly states that it was concerned with a direct rather than a collateral attack on a judgment, and that it was scrutinizing the affidavit for publication upon such direct attack. The affidavit to which the Court there refers in substance merely stated that plaintiff's attorney placed the summons and complaint in the hands of five different persons who were named in the affidavit, and that they returned them with information they could not find defendant or see her, and that she could not be found in the city or county. In that case the Court found that such an affidavit was insufficient upon direct attack and held that where service of process upon a defendant within the county "is attempted to be made by a person *other than the sheriff,* his affidavit should *as a rule* be required showing the nature of the effort made to serve the party, and where practicable the reasons why such service could not be had". This citation shows that the Court in *Kahn v. Matthai,* supra, even upon direct attack would have been satisfied with Herrington's affidavit because the Court indicates that the sheriff's affidavit is not needed where his returns and reports are stated in another affidavit.

The Court likewise indicates that it is necessary not only to state ultimate facts but also the nature of the efforts made and the reasons why service could not be made. This requirement was amply complied with in Herrington's affidavit which in all details states the nature of the efforts made.

The only further point to be noted from *Kahn v. Matthai,* supra, is that where persons other than the

sheriff attempted service, the Court *as a rule* would require the affidavit of the person who made the efforts. By using the term "as a rule" the Court indicates that this is a matter which is in the discretion of the judge and that no hard and fast rule is applicable. In Herrington's affidavit he was in a position to base his statement on his own instructions to the marshal and Gold, on the marshal's written reports and returns, on written reports of the Court's officially appointed process server, whose reports set forth the facts in all necessary detail, and on additional information received by Herrington himself, so that even upon direct attack, the Court in *Kahn v. Matthai,* supra, we submit, would have been perfectly satisfied with Herrington's affidavit.

There is no need to discuss at length the case of *In re Behymer,* supra, because it only repeats the holding in *Kahn v. Matthai* without taking into consideration that *Kahn v. Matthai,* supra, is expressly limited to direct attack.

We do not see how appellee can rely upon *Ricketson v. Richardson,* supra, because all that case holds is that an affidavit which merely repeats the language of the statute and so can only state the ultimate facts referred to in the statute, is insufficient upon direct attack. The main point which the Court makes in this case is to be found at the bottom of page 153, as follows:

> "The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known the residence must be stated."

We are certain that the defects of the affidavit in the *Ricketson v. Richardson* case cannot be found in Herrington's affidavit.

The California Courts are in full conformity with this Court's holding in *Cohen v. Portland Lodge,* supra, in that they hold that there can be recognized no hard and fast rule excluding hearsay from an affidavit for the publication of service. In *Rue v. Quinn,* supra, the Court said (at p. 657):

> "From the nature of the question to be determined the evidence thereon must to a very good extent be hearsay, and the number and character of the persons inquired of must in each case be determined by the judge. Diligence is in all cases a relative term, and what is due diligence must be determined by the circumstances of each case."

We therefore submit that Herrington's affidavit is perfectly sufficient under California practice even upon direct attack, not to speak of the case of collateral attack where the California Courts recognize every kind of an affidavit which tends to show diligent search (*Rue v. Quinn,* supra, and *Clarkin v. Morris,* supra.)

The main points which make the affidavit sufficient under California practices are: first, all statements in the affidavit referring to Herrington's own instructions are naturally admissible evidence; second, all statements in his affidavit referring to the sheriff's written reports and returns are equally admissible; third, Herrington's own statements at the end of the affidavit are also admissible and in themselves would probably

stand by themselves and be sufficient to uphold the service; fourth, Herrington's statements on the written reports which he received from Gold must be considered along with his instructions and the fact that Gold was appointed by the Court. Since there is no exclusion of hearsay evidence in an affidavit of this kind, Herrington's statements on Gold's written reports are sufficient as a part of the affidavit, reading the affidavit as a whole.

VII.

PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION. THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO AMEND WAS AN ABUSE OF DISCRETION.

Appellant's objections to this point (pp. 37-38 of her brief) lead us to only one conclusion, that appellee has an entire misconception of when jurisdiction of the Court attaches and the various steps in the procedure necessary to be done to make it attach. She apparently assumes that the Court's jurisdiction attaches the moment the order for publication is made, whereas it is clear that if the plaintiff upon obtaining an order for publication does nothing further by way of having the summons published, the Court never gets jurisdiction over the person of defendant. It is our contention that there are a number of steps necessary before the Court can even begin to assume jurisdiction. First, there must be a showing by affidavit or sheriff's return that the defendant cannot, after due diligence,

be found within the state. Second, there must be an order of publication. Third, there must be publication. Fourth, there must be proof of publication filed with the Court, and no jurisdiction attaches until all of the foregoing steps have been taken. Therefore, if the Courts, as shown by our citations, have permitted amendments of proof of publication, one of the steps involved in obtaining jurisdiction, to conform the proof to the facts, we can see no distinction in permitting the amendment and the filing of Gold's and Lavelle's affidavits to improve the proof of some of the facts as to diligence set forth in Herrington's affidavit, being another of the steps necessary to confer jurisdiction upon the Court.

We respectfully direct attention to that portion of appellee's brief on page 39, reading as follows:

> "Not a single citation by appellants under this head had to do with an amendment as to matter going to the jurisdiction of the court over the person of the defendant, but, on the contrary, every case cited deals with *proceedings after jurisdiction has been obtained* and under circumstances which did not prejudice the defendants." (Italics ours.)

wherein it appears that appellee's theory of jurisdiction is expressed and that, according to it, by some magic the jurisdiction of the Court attaches the moment the order for publication is granted, and anything and everything that takes place thereafter is of no moment and is amendable to show the actual facts.

We therefore submit that all our citations referring to cases where the service by publication was incor-

rect, as appeared from the proof, but was in fact correct, and where the proof was then amended, are in point. In all these cases it appeared from those documents that the necessary service was not made and this untrue picture was corrected by amending the proof. Thus, for instance, in the case of the *City of Salinas v. Lee,* supra (p. 26 of our Opening Brief), the affidavit of publication of service showed that the summons had not been published for the prescribed period, and so the proof showed that the Court had not obtained jurisdiction. The plaintiff was permitted to file amended proof and so show that in fact the requirements necessary for the Court to obtain jurisdiction had been present, and that only the proof of the elements for the obtaining of such jurisdiction had been incorrect.

We believe that it would unnecessarily increase the length of this brief in discussing each single case cited by us and commented on by appellee in her brief in applying this principle. Each of the cases which we cited is in point if it is read having in mind that the Court cannot obtain jurisdiction until the end of the whole proceedings for publication of service. We again refer to the case of *Thompson v. Thompson,* supra, where a number of cases are cited (L. ed. at p. 353) which all support the rule approved in the *Thompson* case that the jurisdiction of the Court is dependent on the question whether at the time when the order for publication was made the facts necessary for publication were present and that it is immaterial whether the proof of facts constituting the right of the Court to grant service by publication was deficient.

If only the proof was deficient under local law, then other proof might be furnished any time, if it shows the same facts which were alleged to be existent at the time of the order of publication in an affidavit which was defective as to the mode of proof. The same principal is enunciated in *Herman v. Santee,* 103 Cal. 519, at page 523, citing from Freeman on Judgments. We refer to the following cases which cover the exact situation, that amendment of proof has been permitted of a prior defective affidavit for publication of summons:

City National Bank v. Sparks (Okl.), 151 Pac. 225;

Chaplin v. First Bank of Hitchcock (Okl.), 181 Pac. 497;

Oliver v. Kelly (Okl.), 18 Pac. (2d) 1064.

VIII.

THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION THAT HERRINGTON'S AFFIDAVIT PROVED THAT APPELLEE CONCEALED HERSELF TO AVOID SERVICE, CANNOT BE DISTURBED. APPELLEE IS ALSO BY THE FACT OF HER CONCEALMENT ESTOPPED TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

The fact that the defendant-appellee concealed herself to avoid service cannot be proven as a matter of affiant's own knowledge. It lies in the nature of the subject to be proved that it is an inference to be drawn from information received and the futility of the attempts to locate defendant. Consequently, there is no way of proving such fact by an affidavit based on the

affiant's own knowledge. The affiant can do no better than to submit to the Court the essence of the information received and the efforts made, and affirm upon information and belief that defendant is concealing herself to avoid service. Such sworn statement, although of necessity based on information and belief, is a matter of great significance and it can subject the affiant to penalty for perjury. For good and complete proof the Court should know from the applicant whether he knows anything not disclosed to the Court which in his mind negatives the belief that defendant is concealing himself to avoid service. With a sworn statement on information and belief, made in addition to the statements on which his inferences are based, affiant goes on record that he knows nothing which negatives his expressed belief that defendant tries to avoid service. In the mouth of Herrington, as attorney-at-law, this meant that after two years of efforts to locate defendant, nothing had come to his personal knowledge which would interfere with his honest belief that defendant was hiding.

The clues that defendant was concealing herself, stated in Herrington's affidavit, were manifold:

> (1) The marshal's official statement in writing that at the three addresses referred to in the affidavit, three different deputy marshals had made *several* attempts to serve appellee and that persons at these premises always advised that the defendant did not reside there or was away and refused further information concerning her whereabouts (Tr. p. 49);

(2) The marshal's official statement in writing that he attempted to serve appellee in another action for some Los Angeles attorneys (Tr. p. 49);

(3) The report of Gold as specially employed investigator that appellee and Kathryn Riddell, another defendant, whom the marshal had served with subpoena on December 11, 1936, at the Hermosa Beach address, were sister-in-laws (Tr. p. 49);

(4) The inference drawn from appellee's relationship to Kathryn Riddell that appellee had learned from Kathryn Riddell of the pendency of the suit and was anticipating that she would be served as a defendant therein (Tr. p. 49);

(5) The marshal's official statement in writing with regard to appellee's whereabouts, that he had "definitely established that she is residing at the address known as 119 Twenty-fourth Street, Hermosa Beach" (where Kathryn Riddell was served, Tr. pp. 40-41 and 50) and the marshal's further report that upon three different trips (two in the morning and one late at night) his deputy had been unable to serve process and that no one responded or answered the door (Tr. p. 50);

(6) Gold's written statements as process-server appointed by the Court:

(a) That inquiries made at Hermosa Beach indicated that Kathryn Riddell and appellee were then residing, temporarily at least, at appellee's Hollywood address, and that upon his calling

there on March 31, 1937, he was unable to get an answer to his ringing the doorbell although lights were burning inside the house (Tr. p. 52);

(b) That a woman at the Hermosa Beach address had informed him that she was renting the place as a tenant from appellee (Tr. p. 52);

(c) That he had talked with a member of the law firm which had presented appellee in a Superior Court action, and was advised that the attorneys had not seen or heard from appellee since that action was dismissed and that the last address they had was appellee's Burbank address (Tr. p. 53) and that the telephone number at that address was a confidential unlisted number (Tr. p. 53);

(d) That the tax collector's office had advised Gold that the tax bills on the Hermosa Beach property and on the property which was appellee's Burbank address were sent upon her direction to Kathryn Riddell although the properties were recorded in the name of an Elizabeth Gordon;

(7) Independent written information received by affiant from the law firm of Meserve, Mumper, Hughes and Robertson of Los Angeles, that they in another action had made numerous unsuccessful attempts to effect service on appellee at the Hermosa Beach and Burbank addresses, and that neither the marshal nor their own office clerks could locate appellee, which information proved to be still true more than one-half a year thereafter when the attorneys informed Gold on this fact. (Tr. p. 56.)

It seems to us when the judge of the District Court, from an affidavit stating all this and other additional information, and from the marshal's returns, was satisfied that appellee (who in her own affidavit in support of motion does not deny that she was aware of the pendency of the suit) concealed herself to avoid service, that this is a matter of his discretion which could not be disturbed even on appeal but which by no means can be discussed and reviewed in a collateral proceding such as this.

Concealing one's self to avoid service is under Sec. 412 of the California Code of Civil Procedure, a separate ground for an order of publication of service, so that if the discretion of the District Court cannot be disturbed in this respect this fact alone would be sufficient to uphold the judgment.

However, we refer to the cases cited on pages 39-40 of our opening brief for the rule that a person who has concealed himself to avoid service is estopped at any later time to come from his hiding place into the open and to attack the judgment for defects in the service of process. The answer which the law gives to such attack on the judgment is to the effect that if the defendant had not concealed himself personal service could have been made, and that therefore defects in the substituted service cannot be taken advantage of by him.

The fact of concealment is the essential point to work out this estoppel so that even if Herrington's affidavit were insufficient, Gold's and Lavelle's affidavit could be used not merely as amendments of the proof

of the requirements for substituted service but also as additional proof that appellee concealed herself and avoided service.

IX.

APPELLEE BY MAKING HER MOTION TO DISMISS, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

Appellee, in her motion, asked the Court to quash service and dismiss the action. The Court thereupon vacated the judgment and made an order that appellee should file an answer (which answer has been filed by appellee) which recognized the fact that appellee had appeared generally and was within the jurisdiction of the Court.

It seems inconsistent to claim that the Court has not acquired jurisdiction of the appellee's person and that therefore the judgment is void, but that at the same time the appellee is before the Court in the same action and must answer the complaint.

Rule 12(b) of the Rules of Civil Procedure can be construed only in conformity with the fact that a person who pleads is before the Court.

It was held in the case of *Carcelli v. Order of United Commercial Travelers of America* (D.C. Pa., 1042), 47 F. Supp. 433, that defendant by appearing generally in the State Court for the purpose of having

the action removed to the Federal Court, waived the insufficiency of service of summons and could not thereafter question such service in the Federal Court.

The case of *Puett Electrical Starting Gate Corp. v. Thistle Dawn Co.* (D.C. Ohio, 1942), 2 Fed. Rules Dec. 550, is to the effect that applying for leave to answer is a submission to the jurisdiction of the Court, while applying for leave to object to the jurisdiction or to amend the pleading which attacks the jurisdiction is not a general appearance and does not waive the right to question the Court's jurisdiction.

In the case of *Hale v. Campbell* (N.D. Iowa, 1941), 40 F. Supp. 584, reversed on other grounds (127 F. (2d) 594), it was held that a motion to dismiss for want of jurisdiction and for other defenses, purporting to be filed under a special appearance, was to be construed as based on defensive matters which could not be determined without exercising jurisdiction, and hence amounted to a general appearance.

It has also been held in the case of *Grant v. Kellogg Co.* (1943) (7 Fed. Rules Serv. 12(b) 23 case 1), that in an action commenced in a State Court and in which attachment has been levied against assets of the defendant within the State, the defendant may not after removal to the Federal Court make a special appearance limited to defending its interests in the attached fund, but that any appearance will constitute a submission to the jurisdiction of the Court.

As these decisions show Rule 12(b) of the Rules of Civil Procedure does not eliminate the fundamental rule that the fact of pleading to the merits and to

jurisdiction as to the subject matter negatives the defense of lack of jurisdiction over the person. A defendant who asks the Court to dismiss the action, and files an answer, cannot with the same breath claim that he is not before the Court.

In the case of *Security etc. Co. v. Boston etc. Co.,* 126 Cal. 419, at page 422, it was held that if a motion is made to set aside a judgment "on a ground inconsistent with the claim that it is void for want of jurisdiction of the person * * * it constitutes a submission on their (defendants') part to the jurisdiction of the Court, because the relief granted would be inconsistent with any other reasonable hypothesis". (Parentheses ours.) See also

Raps v. Raps, 20 Cal. (2d) 382.

We submit that Rule 12(b) as construed by the Courts does not defeat a rule which is a necessary outgrowth of legal logic.

Appellee has based her motion among other things on the pleas of lack of the jurisdictional amount which goes to jurisdiction of the subject matter and the statute of limitations which goes to the merits.

CONCLUSION.

We conclude that whether or not Herrington's affidavit and the other proof before the District Court was sufficient to satisfy the Court as to the fact that appellee after diligent search could not be found within the State and/or that she was concealing her-

self to avoid service was a matter within the Court's discretion including the point to which degree the Court was satisfied by statements made on hearsay, which discretion of the Court cannot be disturbed in this collateral proceding; that Herrington's affidavit was not defective under California law; that defects in the affidavit as to the mode of proof would not suffice to make the judgment based on the substituted service void and *coram non judice;* that the marshal's return is proper proof for an order of publication; that the recital of due service in the judgment is conclusive upon collateral attack; that the affidavits of Gold and Lavelle were admissible as amended proof of the facts stated in Herrington's affidavit; that concealment to avoid service must needs be proved by an affidavit made upon information and belief, and that a defendant who concealed himself is estopped to rely on the defense of improper service of process; that appellee in making a motion conceding jurisdiction of the subject matter and the merits of the case submitted her person to the jurisdiction of the Court. We therefore respectfully submit that the order of the District Court appealed from should be reversed.

Dated, San Francisco,
July 26, 1943.

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